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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

CALIFORNIA NEW CAR DEALERS
ASSOCIATION,

Protestant,

v.

JAGUAR LAND ROVER NORTH
AMERICA, LLC,

Respondent.

PROTEST NO. PR-2463-16

**PROTESTANT CALIFORNIA NEW CAR
DEALERS ASSOCIATION'S POST-
REMAND REPLY BRIEF**

1 Protestant California New Car Dealers Association (“CNCDA”) submits this post-remand
2 reply brief in the above entitled protest wherein Jaguar Land Rover North America (“JLRNA”) is
3 respondent.

4 JLRNA asserts that nothing in subdivision (y)(1) of Section 11713.3 prohibits a
5 manufacturer “from requiring dealers to conduct due diligence in an effort to identify potential
6 vehicle exporters.” However, that assertion is overly broad and is not based on an analysis of the
7 law. As demonstrated in Protestant’s post-remand opening brief, the law prohibits threats or
8 imposition of adverse action based on exporting, unless and only unless the dealer knew or should
9 reasonably have known of the customer’s intent to export. JLRNA’s assertion cannot square with
10 this statutory language if “requiring dealers to conduct due diligence” is accomplished by
11 threatening them with adverse action in a way that does not make clear that the adverse action
12 will not be imposed unless the dealer knew or reasonably should have known of the customer’s
13 intent to export.

14 Perhaps some language regarding due diligence could exist in an export policy or
15 elsewhere that steers clear of threatening dealers with adverse action, and/or ensures that any
16 threat of adverse action is conditioned, as the law requires, on the statutory dealer knowledge
17 standard. But JLRNA’s policy does neither of these things. Instead, it threatens severe penalties
18 without so much as a mention of the statutory dealer knowledge requirement, electing instead to
19 place all of its focus on JLRNA’s self-created “adequate level of due diligence” requirement. As
20 such, the Policy violates subdivision (y)(1).

21 JLRNA’s contention that CNCDA has not met the burden of proof to show that use of the
22 phrase “adequate level of due diligence” amounts to a threatened adverse action raises a
23 strawman issue. The adverse action is not in the use of that phrase, it is in the clear and
24 unmistakable penalties set forth in the Policy that the Policy says will ensue if a dealer fails to
25 conduct an adequate level of due diligence. As shown in the opening brief, since the phrase is the
26 only condition standing between the dealer and adverse action, is that condition (i.e., the due
27 diligence standard) equivalent to the knew or reasonably should have known statutory standard,
28 and the answer is no.

1 JLRNA also argues that by adding the language required by Section 11713.3(y)(3), the
2 subdivision (y)(1) problem will be solved because the subdivision (y)(3) language itself will be
3 sufficient. However, subdivision (y)(3) calls for the rebuttable presumption to be stated in the
4 policy, and the rebuttable presumption itself (set forth in subdivision (y)(1)) states that the
5 presumption is that the dealer did not have reason to know of the customer's intent to export.
6 Thus the presumption language in both subdivisions (y)(1) and (y)(3) only makes sense if the
7 policy first conforms to the requirements of the first sentence subdivision (y)(1) by conditioning
8 any threat or imposition of adverse action on the statutory knowledge requirement. The Policy
9 violated subdivision (y)(1) by failing to do this in the first instance and unless this omission is
10 corrected in any a future version of the Policy, simply tacking-on a statement regarding a
11 presumption about dealer knowledge would only make the Policy more confusing.

12 For the foregoing reasons and those explained in CNCDA's prior briefs in this matter,
13 CNCDA respectfully requests a ruling that it met its burden to establish that the due diligence
14 standard in the Policy violates the prohibitions of subdivision (y)(1) of Section 11713.3.

15
16 Dated: June 12, 2017

ARENT FOX LLP

17 By: 

18 Halbert B. Rasmussen
19 Franjo M. Dolenac
20 Attorneys for Protestant
21 CALIFORNIA NEW CAR DEALER
22 ASSOCIATION
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1 In the Matter of the Protest of:
2 California New Car Dealers Association vs. Jaguar Land Rover North America, LLC
3 Protest No. PR-2463-16

4 **PROOF OF SERVICE**

5 I am a citizen of the United States. My business address is Arent Fox LLP, 555 West Fifth
6 Street, 48th Floor, Los Angeles, California 90013-1065. I am employed in the County of Los
7 Angeles, where this service occurs. I am over the age of 18 years, and not a party to the within
8 cause.

9 On the date set forth below, according to ordinary business practice, I served the
10 foregoing document(s) described as:

11 **PROTESTANT CALIFORNIA NEW CAR DEALERS ASSOCIATION'S POST-
12 REMAND REPLY BRIEF**

13 ☐ (BY FAX) I transmitted via facsimile, from facsimile number 213.629.7401, the
14 document(s) to the person(s) on the attached service list at the fax number(s) set forth
15 therein, on this date before 5:00 p.m. A statement that this transmission was reported as
16 complete and properly issued by the sending fax machine without error is attached to
17 this Proof of Service.

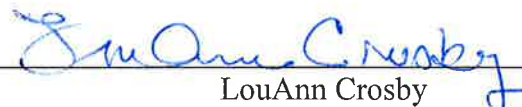
18 ☒ (BY E-MAIL) On this date, I personally transmitted the foregoing document(s) via
19 electronic mail to the e-mail address(es) of the person(s) on the attached service list.

20 ☒ (BY MAIL) I am readily familiar with my employer's business practice for collection
21 and processing of correspondence for mailing with the U.S. Postal Service, and that
22 practice is that correspondence is deposited with the U.S. Postal Service the same day as
23 the day of collection in the ordinary course of business. On this date, I placed the
24 document(s) in envelopes addressed to the person(s) on the attached service list and
25 sealed and placed the envelopes for collection and mailing following ordinary business
26 practices.

27 ☐ (BY OVERNIGHT DELIVERY) On this date, I placed the documents in envelope(s)
28 addressed to the person(s) on the attached service list (New Motor Vehicle Board Only),
and caused that envelope to be delivered to an overnight delivery carrier, Federal
Express, with delivery fees provided for, for next-business-day delivery to whom it is to
be served.

☒ (State) I declare under penalty of perjury under the laws of the State of California
that the foregoing is true and correct.

Executed on June 12, 2017 at Los Angeles, California.


LouAnn Crosby

In the Matter of the Protest of:
California New Car Dealers Association vs. Jaguar Land Rover North America, LLC
Protest No. PR-2463-16

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